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No. 83-.....

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY DANE MOORE, PETITIONER
v.
STATE OF ALABAMA, RESPONDENT

Petition for a Writ of Certiorari
To The Supreme Court of
The State or Alabama

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QUESTIONS PRESENTED FOR REVIEW

1. If the affidavit supporting a search warrant (a) effectively fails to establish a nexus between the crime charged and the residence of the defendant, and (b) contains material false statements made by the affiant; can the resulting tainted evidence be used to convict the defendant?

2. In light of the protections afforded by the Fifth Amendment due process clause, can the defendant charged under state law, be forced to suffer conviction, fine and imprisonment, when no factual showing of mens rea was made?

3. When no mens rea was shown by the facts in evidence before the trial court; and the defendant was denied relief on that error by means of appeal; can he be further deprived of his right to raise that error, seeking relief by petition for writ of remand?

4. Did the actions of the Alabama Courts, denying remand for disposition of the mens rea question deprive the defendant of equal protection rights as guaranteed by the Fourteenth Amendment?

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In The

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October Term, 1983

NO. 83-.....

TIMOTHY DANE MOORE, PETITIONER
v.
STATE OF ALABAMA, RESPONDENT

Petition for a Writ of Certiorari
To The Supreme Court of
The State of Alabama

Petitioner requests that a writ of certiorari issue, in this case, to review the judgment of the Alabama Supreme Court, and the Opinions of the Alabama Court of Criminal Appeals.

REPORT OF OPINIONS BELOW

The Supreme Court of the State of Alabama denied certiorari in this cause without opinion, or formal written order. The Petitioner herein received clerical notice of the denial under date of December 16, 1983.

The cause was numbered 82-1164, and styled "EX PARTE: TIMOTHY DANE MOORE".

The Alabama Court ot Criminal Appeals first denied relief by OPINION, as yet unreported, dated 5 July, 1983, the text of which is attached as APPENDIX "A".

On 16 August, 1983, the Alabama Court or Criminal Appeals denied rehearing, by its order ON REHEARING, which is as yet unreported. The text is attached hereto, as APPENDIX "B".

JURISDICTIONAL STATEMENT

1. The date of the order issued by the Alabama Supreme Court denying certiorari was December 16, 1983.

The Rules of the United States Supreme Court, Rule 20.1 provides:

> "a petition for writ of certiorari ... shall be deemed in time when it is filed with the Clerk within sixty days after the entry of ... judgment."

Sixty calendar days from December 16th, 1983 would fall on February 14th, 1984, for timely filing. The Petitioner has met that jurisdictional deadline.

2. The jurisdiction or this Court is duly invoked, pursuant to Article III, Section 2, of the Constitution of the United States.

3. Jurisdiction is specifically set out by statute in this cause by 28 U.S.C. 1257(3), respecting a right, privilege or immunity claimed under the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment Four states in pertinent part:

> "... no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Five states in pertinent part:

> " ... No person shall ... be deprived of life, liberty, or property without due process of law."

Amendment Fourteen states in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ALABAMA STATE STATUTES

Title 20, 1975 Code of Alabama, Section 2-70 (Code 20-2-70), states in pertinent part:

> "... any person who possesses ... controlled substances enumerated in Schedule I, II, III, IV, and V is guilty of a felony ..."

STATEMENT OF THE CASE

1. Timothy Dane Moore was originally indicted in Montgomery County, State of Alabama, on July 26, 1982. Each of the three Counts charged possession of a controlled substance, in violation of Title 20, Section 2-70(a), 1975 Code of Alabama. The Indictment followed the execution or a search warrant which Petitioner is attacking.

2. The affidavit (A:)[1] in support of the search warrant, essentially alleged:

2.1 The Police had identified a seller of cocaine, Bob Robinson, Jr.

2.2 The seller, Robinson, while under surveillance in an apartment in Montgomery, sold a small quantity of cocaine to an undercover policewoman, who was posing as a "buyer". Robinson then left the apartment,

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[1] Appendix hereto, Exhibit "C".

and traveled directly to a piece of rural property owned by the Petitioner. The police affidavit (A:C) claimed they did not lose "visual contact" with the subject, Robinson.

The precise language used, was:

> Sgt. Bodine: "... the subject was observed going straight to the previously described residence of Timothy D. Moore without stopping. After the subject arrived at the residence, constant visual surveillance was maintained. ..."
>
> "At no time was visual contact lost on this subject (Robinson)."

2.3 The Seller Robinson later returned to the Montgomery apartment, and gave an additional quantity of cocaine to the "buyer" (i.e. the undercover policewoman).

When, in due time the affidavit was challenged, by Motion to suppress, the Petitioner was able to establish:

2.4 That there was nothing in the affidavit directly connecting the Petitioner Timothy Dane Moore with the drug seller;

2.5 That there was nothing to indicate Robinson's purpose in leaving Montgomery for Moore's property, or that he got any drugs there.

2.6 That Robinson, in fact, was never sighted either entering Moore's home, or contacting him, and the affidavit shows as much by its own omissions.

2.7 That there was no casue to believe Robinson had received anything from the Petitioner, much less any "controlled substance".

3. The only "facts" in the affidavit which actually called Moore's name are:

> "... the subject was observed going straight to the previously described residence of Timothy D. Moore without stopping. ... After approximately thirty minutes said subject departed from the residence of Timothy D. Moore and drove non-stop straight back to the location where the undercover officer was waiting." ...
>
> "The foregoing is based upon personal knowledge of the affiant and on facts obtained by the Vice and Narcotics Unit, Montgomery Police Department ..."

No oral testimony had been taken at the court hearing to show "probable cause" to issue the search warrant, so the "facts" in Sgt. Bodine's affidavit were the sole foundation for the warrant.

4. The day after the Indictment, the Petitioner filed his Motion to Suppress the fruits of the illegal search, to wit: 950 tranquilizers, 7 grams of cocaine, and approximately 1 pound of marijuana. Petitioner contended the search warrant was invalid for lack of probable cause.

A suppression hearing was begun on July 27, 1982, and continued until August 16, 1982. The testimony in the suppression hearing, exposed a false representation in Bodine's earlier affidavit (A:C).

Oral testimony by Sgt. Bodine at the suppression hearing:

> "Q. (By defense counsel) Now you said that constant visual surveillance was maintained on the residence of Tim and Jayne Moore down there in Sellers, Alabama.

A. No, sir, I believe I said the property.

Q. Oh, the property? Seventy Six acres? Ya'll could see part of the 76 acres?

A. Yes, sir, you can see quite a bit from 2,000 feet up.

Q. Yes, sir, you can see quite a bit of the Moore residence, Mr. Bodine? You have been down there, haven't you?

A. yes, sir, I have.

Q. You can't see quite a bit of it, can you?

A. Of the residence, no."

In spite of Bodine's false statements, the Trial Court denied the Motion to Suppress on August 19, 1982.

5. On Monday, September 13, 1982, the date set for trial of the cause, Moore elected to waive his right to trial by jury, and entered into a stipulation of facts (A:D) for the purpose of allowing a trial by the court.

The proceedings commenced in open court; no case was made by the state or the

defense; and the court proceeded to a guilty verdict in the cause. (R:104):

> "Okay, based upon the stipulation of facts and the evidence I have heard,[2] it is my opinion, and I conclude that the defendant is found guilty beyond a reasonable doubt and to a moral certainty by the evidence in the case. I therefore find him guilty."

6. On November 19, 1982, Moore was sentenced to 15 years in the state penitentiary, with a fine of Fifteen Thousand dollars.

7. Moore appealed the illegal search and seizure to the Alabama Court of Criminal Appeals. The conviction was affirmed, with OPINION (A:A).

8. Moore submitted his application for rehearing, and additionally petitioned the appeals court for remand of the case to the trial court. Moore sought retrial, based on a fatal error of the state, which made no

---

[2] In the suppression hearing.

prima facie showing of mens rea. The error had not been raised by Moore's counsel on appeal.

The court summarily denied the remand, and denied rehearing by opinion ON REHEARING (A:B).

9. Moore duly petitioned the Alabama Supreme Court on certiorari, but his petition was denied, with nothing but a clerical notice issuing to that effect. The denial of certiorari was dated December 16, 1984.

10. The federal questions sought to be reviewed by this Court were raised in the following manner, and at the following times:

10.1 Montgomery County Circuit Court is a court of general jurisdiction, competent to try criminal cases and determine constitutional questions, federal and state. The defendant Moore, acting by and through

counsel, moved the very day after the indictment to suppress the evidence of the illegal search, invoking the protections of the Forth Amendment, thereby raising a federal question.

The motion to suppress (R:126) stated:

> "... the affidavit in question is wholly insufficient to establish probable cause in the mind of the issuing magistrate."

10.2 The Alabama Court of Criminal Appeals is a tribunal constitutionally competent to try issues on appeal, and grant extraordinary writs in the interests of justice. While that court still had jurisdiction, and while the Petitioner's application for rehearing was still pending, petitioner, by necessity, had relieved counsel, and proceeded on his own behalf.

In reading his own record on appeal, he observed the fatal variance in pleading and proof in the trial court, based on lack of mens rea. Moore determined that he had no

chance available to raise that issue on appeal, for failure of trial counsel to raise it timely. Moore proceeded by petition for remand.

The petition for remand fully set out his right to due process under the Fifth and Fourteenth Amendments, and the necessity of a prima facie case on mens rea, which had not been shown by the state in the court below.

The federal question was properly raised by the petition for remand. His procedural approach was appropriate and timely. The federal cases hold that he is entitled to relief.

The Appeals Court erred in refusing to remand with an order to set aside the void judgment, and the Alabama Supreme Court erred in denying certiorari.

REASONS FOR GRANTING WRIT

The Alabama Supreme Court, and the Alabama Court or Criminal Appeals have decided a federal question in a way in conflict with applicable decisions of the Supreme Court.

The Alabama Supreme Court, being a court of last resort , has decided a federal question in a way in conflict with a decision of another state court of last resort or of a federal court of appeals, in that it denied certiorari, upholding erroneous determinations of the Alabama Court of Criminal Appeals.

I.

If the affidavit supporting a search warrant (a) effectively fails to establish a nexus between the crime charged and the residence of the defendant, and (b) contains material false statements made by the affiant; can the resulting tainted evidence be used to convict the defendant?

NO NEXUS

The decision of the Alabama Court of Criminal Appeals respecting the affidavit in question misapprehends the law, clearly falls below the minimum constitutional standards set by this court, and sets a dangerous precedent utterly destructive of the Fourth Amendment.

In the OPINION (A:A) of the Alabama Court, nothing is necessary for a search warrant affidavit but the name of a seller, and the description of a piece of property the seller visited. There is no case on record to match this Alabama case.

The affidavit in question here totally failed to meet the standards laid out by this court in their recent decision **Illinois v Gates**, 51 LW 4709, 6/7/83:

> "... We reaffirm the totality of circumstances analysis that traditionally has informed probable cause determinations. See Jones v United States, supra, United States v Vertresca, supra, Brinegar v United States, supra."

The Alabama Court of Criminal Appeals cited **Gates**, and concluded that the issuing Magistrate had a "substantial basis" for issuing the Warrant. The Court failed, however, to cite a single fact to establish any such substantial basis. There was therefore, no factual foundation for the "totality" test.

A rather concise statement concerning the conditions which must exist, before the police can breach the Fourth Amendment protections, is set out in the article **Search and Seizure in the Supreme Court**, University of Chicago Law Review 28:664 at 687 (1961):

> "Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence; that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. (Footnoted as follows) See United States v Old Dominion Warehouse, Inc. 10 F2d 736, 738 (CA2 1926)."

Petitioner would point out a case very similar to the instant case, determined by the Iowa Supreme Court, **State v McManus**, 243 NW 2d 575 (1976). The court ruled that a visit similar to that of Bob Robinson, Jr. at the Moore property was sufficiently consistent with innocent behavior and that more was needed for a search warrant.

The cases of **Jones, Brinegar and**

Ventresca, cited in **Illinois v Gates**, supra, all clearly show that a multitude of material facts are necessary to undergird a search warrant.

Jones showed five material facts, **Brinegar** showed six material facts, **Ventresca** showed ten material facts.

Contrast that track record with the showing in Moore, the instant case, wherein only one material fact was shown - the drug seller, Robinson, came to Petitioner Moore's property, and remained there for approximately thirty minutes.

The Alabama Court of Criminal Appeals case authority was basically divided into three categories:

(1) Those involving the pickup of drugs from premises or property which was the subject of a search warrant, including, **State v Hadd**, 619 P2d 1047 (Ariz. App.1980), **State v Witwer**, 642 P2d 828 (Alaska

App.1982), **State v Yaritz**, 287 NW2d 13 (Minn. App.1982), **State v Muffeo**, 642 P2d 404 (Wash. App.1982), U.S. v Kunkler, 679 F2d 187 (CA9 1982), **U.S. v Chester**, 537 F2d 173 (CA5 1976).

Every one of those distinguished cases reported at least two trips by the drug runner to the residences which were the subject of the search warrant. In Moore's case there was but a "single trip" to the rural premises, and no proof of entry into Petitioner's residence, so the cases above cannot apply.

(2) Those involving the principle of reliability through a "controlled drug buy", namely **State v Watson** 550 P2d 89 (Ariz. 1976), and **State v Urritria**, 539 P2d 913 (Ariz. App.1975).

There was no "controlled buy" in the case of Moore, and there was no reliable informant, according to the sworn affidavit

and later testimony.

(3) Those cases involving at least a single trip, supplemented by a reliable informant's statement, such as **U.S. v Valenzuela**, 596 F2d 824 (CA9 1979), cert. denied, 441 US 965 (1979), and **State v Mena**, 399 So2d 140 (La. 1981).

No informant was used in the case of Moore to "supplement" the trip to the property, so Moore's case is distinguished.

All the three categories cited by the state court, if properly applied, would protect the Petitioner's rights guaranteed by the Fourth Amendment; but the Alabama Court directly departed from the factual burden recognized and quoted in the subject cases, finding "probable cause", based on nothing but speculation and conjecture.

If the Alabama Courts found no facts from which to bring the Petitioner's case within the ambit of these cases, how then

could there have been a "substantial basis" for the search warrant, as described in **Gates**?

MATERIAL FALSE STATEMENTS

The Petitioner has previously shown directly from the Record that Sgt. Bodine claimed in the false affidavit that "constant visual surveillance was maintained"; yet his testimony later was diametrically opposite, that he did not see the Moore residence, at that time.

If he did not see the residence, and he did not see Robinson enter or leave the residence, how could he swear an affidavit on personal knowledge, causing a "legal" search of such a residence?

See **Franks v Delaware**, 438 US 154, 155 (1978):

> "If, after a hearing, defendant establishes by a preponderance of the evidence that the false statement was included by the affiant knowingly and intentionally, and with reckless disregard for the truth, and the false statement was

> necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit."

The Sergeant's sworn testimony that he did not see the house amounts to a preponderance of evidence that his earlier sworn statement was false. The false statement made was absolutely necessary for the warrant to issue. Bodine knew, or should have known that the warrant would not issue without his false statement about the "constant visual surveillance", so deliberately phrased as to falsely induce the Magistrate to think that Bodine saw Robinson go into the Moore's residence, when he in fact did not see any such thing.

II.

In light of the protections afforded by the due process clauses contained in the Fifth and Fourteenth Amendments, can the defendant charged under state law, be forced to suffer conviction, fine and imprisonment, when no factual showing of mens rea was made?

The facts in the Record are strictly limited to those heard by the trial court Judge in the suppression hearing of July 27th, as continued, and the written STIPULATION OF FACTS (A:D). The defendant gave no testimony at the suppression hearing, and he stipulated to nothing in the way of facts going to establish "mens rea" in his STIPULATION.

How, then, can facts be shown from the Record, allowing an objective judge to make a determination of guilt as to that indispensable element of proof? The Petitioner has meticulously searched the Record, and finds none. This Court, upon examining the Record by Writ of Certiorari

to the Alabama Court will also find none.

The sole "fact" connecting the Petitioner in any way was contained in the STIPULATION OF FACTS (A:D), executed by Petitioner's trial counsel, that:

> "That the charges arose from the execution of a search warrant at the home of Tim and Jayne Moore..."

Given nothing but that "factual" basis for application of the law, Petitioner shows that the Fifth Amendment due process guarantee will not allow conviction, and judgment without something more, to constitute a prima facie showing on criminal intent. According to the authority shown in the case of **Temple v State** 366 So2d 740 (Ala. 1979), even admission of ownership of property where the drugs are found does not establish mens rea. An additional showing of "guilty knowledge" is demanded.

The **Temple** Court quoted **Talbot v State**, 23 Ala. App. 559, 129 So 323 (1930), etc.

(other cites omitted):

> "To permit a conviction of this character to stand upon such testimony would be unconscionable. It would be an exceedingly dangerous precedent to hold that the mere finding of prohibited liquor in the home of a citizen, with nothing to connect the accused therewith, and nothing to impute any knowledge of the fact to him is sufficient to deprive him of his liberty and brand him a criminal before the world. If such were the law, every citizen would be at the mercy or an enemy who by merely surreptitiously placing the inhibited article in the home of his enemy could wreak his vengeance through the aid of the law in this dastardly manner. The law contemplates no such condition, nor will the courts countenance such a thing. The law in its wisdom provides that every person charged with crime is presumed to be innocent, and this presumption is not an empty or meaningless provision; to the contrary, it is regarded as evidence in behalf of the accused, and attends him as such throughout the trial, or until the presumption is overcome by legal evidence which shows his guilt beyond all reasonable doubt and to a moral certainty. Conjectures, suspicions, hatred, prejudices, conclusions and guesswork have no place in the proper administration of the law; and to willfully hold otherwise would do violence to the conscience and integrity of the person so doing, be he judge, juror, officer, or witness."

According to the Fifth and Fourteenth Amendments, our citizens unassailably enjoy

the due process right to the presumption of innocence, until the corpus delecti has been proven.

The trial court's failure to acquit, and the appeals court's failure to reverse constitute grave error, due to be dealt with.

III.

When no mens rea was shown by the facts in evidence before the trial court; and the defendant was denied relief on that error by means of appeal; can he be further deprived of his right to raise that error, seeking relief by petition for writ of remand?

The Petitioner proceeded with counsel in all stages of the proceeding throughout trial, and most of the appeal process. He had to take over his own case at a late date, and at that time was struck with the serious nature of the earlier failure to appeal the issue of "mens rea" at the trial court level, for consideration on appeal.

It is the position of the Petitioner

that the trial court conviction is a void judgment under the law, inasmuch as the trial court, in its general verdict, not only made no finding on the element of mens rea, but had available no basis in fact or facts, upon which a finding or verdict of guilt on that element could be based.

The denial of remand was a denial of justice, considering that actions of prior counsel had effectively deprived Moore of any chance to attack the error by means of "appeal".

The concept of allowing and upholding a void judgment, such as this, is entirely foreign to American justice. Our standards of jurisprudence especially favor the granting of justice, even by unusual means, and especially so, when a defendant has been deprived, through no fault of his own, and also when he is proceeding pro se.

Petitioner shows this Court not only the

difficulty of proceeding pro se, but the tendency of some courts and counsellors to discount the positions advanced by pro se litigants, regardless of merit. Since this Court has recognized the right of criminal defendants to proceed without licensed counsel, surely the Court will protect the right to have meritorious arguments decently faced.

The Alabama Court summarily denied remand to set aside the void judgment, making no determination on the substance. Such a ruling, if allowed to stand, would directly controvert the position advanced by this Court previously, that remand is a proper avenue of redress in such cases.

Such errors are normally redressable through the avenues shown in **State v Garcia**, 19 NM 414, **Wiborg v U.S.**, 163 US 632 (1895), **Sykes v U.S.**, 204 F 909 (CA8 1913), **Doe v U.S.** 253 F 903, 905 (CA8 1918). The

Petitioner duly raised that authority, seeking remand, but relief was denied him.

IV.

Did the actions of the Alabama Courts, denying remand for disposition of the mens rea question deprive the defendant of equal protection rights as guaranteed by the Fourteenth Amendment?

Petitioner has shown the extensive citation of authority quoted by the Alabama Court of Criminal Appeals. Said authority can be followed, and has been, without violating Fourth and Fifth Amendment protections, if the facts and circumstances are identical to those in the cases employed.

When and where the Alabama Court depart from the factual parameters of their own cases, making application of those cases against the Petitioner, without the requisite factual foundation, they are impermissably exceeding their authority. The actions of the Appeals Court deprive the

Petitioner of protections afforded to other litigants in similar circumstances, and hence violates his Fourteenth amendment equal protection rights.

When the search warrant cases demand "two trips" for probable cause with other defendants, but only one with Moore, the result is unequal application of the law.

When other search warrant cases demand either an informant, or a "controlled buy" as grounds for search warrants, and Moore's case demands none, that is unequal application of the law.

When all the other Alabama and national cases demand evidence of guilty knowledge and Moore's case demands none, that is unequal application.

When all other cases demands the corpus delecti be proved, and Moore's case does not, then Moore has been unequally treated. The Fourteenth Amendment specifically

prohibits the kind of abuse that the Petitioner Moore has suffered here.

CONCLUSION

WHEREFORE Petitioner Timothy Dane Moore submits that the Writ of Certiorari is due to be granted, and upon final determination of the cause, the Petitioner's conviction in the Circuit Court of Montgomery County, Alabama should be reversed in that:

(a) The affidavit in support of the search warrant was sadly lacking in facts to support a reasonable conclusion that drugs were actually present in the residence of the Petitioner. If thisCourt allowed the warrant to stand, it would constitute a license for unscrupulous persons to wreak their vengeance on innocent enemies. Temple, supra. It would grant and allow the police dangerous new powers to follow whomever they like, to premises where they may have left dangerous drugs, and thereby obtain a search

warrant for the conviction of innocent persons.

(b) This Court should move swiftly to condemn material false statements, accomplished directly or indirectly, by commission or omission, to discourage the kind of behavior here on the part of overzealous police officers, such as Sergeant Bodine, who was determined to get a search warrant, facts or no facts.

(c) When the Petitioner suffered conviction in violation of the presumption of innocence, based on nothing but speculation and conjecture, and when the courts refuse to permit or allow any hearing on remand to consider the issue, the due process deprivation rises to such a level that denial of a hearing on the merits amounts to a patent denial of justice.

The Alabama Courts have totally failed to render justice. This Court must not

fail. The hallmark of a civilized, law-abiding society is the right of every citizen to enjoy a meaningful avenue of access to a decent forum for redress or his grievances. That forum is duty bound, NOT ONLY TO HEAR HIS COMPLAINT, BUT TAKE JUST ACTION TO RESOLVE IT.

The Alabama Courts have done neither.

The Petitioner is entitled to relief by certiorari.

Respectfully submitted,

TIMOTHY DANE MOORE, Attorney for himself

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Montgomery, Alabama 36107
205 / 264-1863

AFFIDAVIT OF SERVICE

I, Timothy D. Moore, attorney for myself, Petitioner herein, first being duly sworn, hereby certify that on the ____th day of February, 1984, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI on the State of Alabama, Respondent herein, by mailing a copy in a duly addressed envelope, with First Class Postage prepaid, to Charles Graddick, Esq., Attorney General for the State of Alabama, at: Office of the Attorney General, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama 36130.

_____

Subscribed and affirmed to before me,
This _____ day of February, 1984.

_____

Notary Public, State at Large
My Commission expires:

APPENDIX "A" [dated: 5 JUL 1983]

STATE OF ALABAMA JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83
3 Div. 713

Timothy D. Moore

v

State

Appeal from Montgomery Circuit Court

BOWEN, PRESIDING JUDGE

The defendant was indicted for the possession of cocaine, diazepam, and marijuana. He waived his right to trial by jury and was found guilty by the court upon a stipulation ot facts. Sentence was fifteen years' imprisonment and a $15,000 fine. The only issue raised on appeal is the sufficiency of the affidavit to support a finding of probable cause for the issuance of the search warrant for the defendant's residence.

In pertinent part, the affidavit of Montgomery Police Officer Dennis Bodine states:

> "And the facts tending to establish the foregoing for issuance of a daytime search warrant are as follows: On two previous occasions, 7/9/82 and 7/15/82, a subject sold cocaine to an undercover Montgomery police officer. On 7/20/82, the undercover officer ordered an additional ounce of cocaine from same subject. At approximately 10:02 A.M. this date, 7/20/82, the subject met with the undercover officer and sold one-half ounce of cocaine. At the time of this sale he was unable to provide the full ounce ordered, and he requested that the undercover officer advance him the money needed to make the additional one-half ounce purchase which was done. At approximately 10:06 A.M., the subject left the company of the undercover officer and began his journey to the residence in Sellers, Alabama. Utilizing helicopter surveillance as well as ground surveillance, the subject was observed going straight to the previously described residence of Timothy D. Moore without stopping. After the subject arrived at this residence constant visual surveillance was maintained. After approximately thirty minutes said subject departed from the residence of Timothy D. Moore and drove non-stop straight back to the location where the undercover officer was waiting. Upon meeting with the undercover officer, said subject gave him an additional quantity of cocaine.

> At no time was visual contact lost on the subject. The aforegoing is based upon personal knowledge of the affiant and on facts obtained by the Vice and Narcotics Unit, Investigative Division, Montgomery Police Department, Montgomery, Alabama, and is made for the purpose or securing a warrant for the premises of Timothy D. Moore or Jayne Moore, located in Montgomery County, Montgomery County [sic], Alabama, in the daytime only."

It was stipulated that this was all the information put before the district court to justify the ;issuance of the search warrant.

"(A)n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." Whitely v. Warden, 401 U.S. 560, 565, n. 8 (1971). Here, there is no contention that the affidavit was supplemented by oral statements to the magistrate. Thus, the only issue is whether the affidavit is facially sufficient. In other words, do the facts contained in the affidavit constitute

probable cause?

In support of his argument that there was no probable cause for the issuance of the search warrant, the defendant relies on State v. McManus, 243 N.W.2d 575 (Iowa, 1976). In that case the drug dealer told the undercover police officer that he was unable to make his contact for the marijuana and would try again in approximately forty-five minutes and would return in two hours. The dealer was kept under surveillance. After leaving the undercover agent, the dealer went to the defendant's farmhouse. He shortly returned to his rendezvous with the undercover agent and sold him twenty pounds of marijuana. The court found that the dealer's stop at the farmhouse, without more, was insufficient to support a finding of probable cause that the defendant had committed any offense.

> "The sworn affidavit and abstract of oral testimony showed only that Goodrich

(dealer) stopped at the defendant's farmhouse between the time he met with Deputy Warner (undercover agent) and the time he delivered the marijuana to the deputy. We do not hesitate to say the visit by Goodrich to the farmhouse, along with his earlier mention of a 'contact', cast upon defendant a certain aura of suspicion. Probable cause, however, requires more than mere suspicion. State v. Birkestrand, supra, 239 N.W.2d at 357; State v. Shea, 218 N.W.2d 610, 614 (Iowa 1974).

"Our problem with the facts of this case is that there was nothing beyond the mere coincidence of timing of the visit of Goodrich to the McManus farmhouse to connect defendant with any wrongdoing. There was no indication from the affidavit for the search warrant or the abstract of the oral testimony that Goodrich's auto did not already contain the marijuana before his visit to the farmhouse to his car while there or that he even opened the trunk of the vehicle at any time he was at the farm. There was no indication of any independent information linking defendant to wrongdoing, of which the events or November 1 might have been corroborative. There was no indication that Goodrich or anyone else provided information tending to incriminate defendant. Defendant himself was apparently not observed on November 1; the information for the search warrant indicated the affiant did no know who occupied the house near Lone Tree. There was no indication or any other suspicious visits to defendant's home."

. . . .

> "In the instant case, Goodrich's stop at the farmhouse, even with its hint of suspicion due to the timing of the visit, was insufficient, without more, to support a finding of probable cause that the defendant had committed or was committing an offense. Such a visit was sufficiently consistent with innocent behavior and activity that more was needed for the issuance of the warrant. We have said that innocent-appearing activity cannot be used to bolster an otherwise inadequate warrant application." McManus, 243 N.W.2d at 578-79.

McManus was a five to four decision of the Iowa Supreme Court. The four dissenting justices found that "(t)he timing of Goodrich's visit to the farmhouse, which the court calls 'mere coincidence', is highly probative" of illegal activity in the context in which it occurred. They found that "a reasonably cautious person could reasonably conclude from these facts and circumstances that marijuana would be found in the farmhouse, and that probable cause therefore existed to issue the search warrant." McManus,

Some courts have been reluctant to find a sufficient nexus or connection between the criminal activity, the things to be seized and the place to be searched is not the defendant's own residence or under his control. W. LaFave, 1 Search and Seizure Section 3.7, n. 110 (1978). However, other courts have not shown such hesitation. United States v. Valenzuela, 596 F.2d 824 (9thCir. 1979). cert. denied, 441 U.S. 965 (narcotics sellers seen leaving his house before going to where sale occurred); State v. Witwer, 642 P.2d 828 (Alaska App. 1982) (before sale, dealer told agent he had to get drugs from his connection, went to premises, returned with defendant and, after arrest, told agent he had obtained drugs from defendant); State v. Yaritz, 287 N.W.2d 13 (Minn. 1979) (two sales elsewhere, each time defendant observed going straight from his house to the place of the sale).

Judged by the standards set out in United States v. Chester, 537 F.2d 173, 175 (5th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), the district court's finding of probable cause should be sustained.

> "A probable cause issue can rarely, if ever, be resolved with the exact logic of a Euclidean theorem. Each case must turn on its facts. Some guideposts, however, are available to a reviewing court. Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The issuing magistrate is not to be confined by niggardly limitations or by restrictions on the use ot his common sense. Id. See United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). And the magistrate's determination of probable cause should be paid great deference on appeal. Spinelli v. United States, supra, at 419, 89 S.Ct. 584; Jones v. United States, 362 U.S. 257, 270-71, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)."

Although the court in McManus found the dealer's visit to the defendant's residence only a "mere coincidence of timing", under the facts of this case, we find the dealer's

visit [sic] to the defendant's home extremely significant in finding the existence of probable cause. State v. Hudd, 619 P.2d 1047, 1053 (Ariz.App. 1980) (Fact that suspected marijuana dealer was observed visiting defendant's home immediately after he arranged to sell marijuana to undercover agents, and fact that marijuana was found in suspected marijuana dealer's vehicle immediately after he left defendant's home, supported conclusion of probable cause that marijuana was located in defendant's home, for purpose of issuing warrant to search the home); State v. Watson, 550 P.2d 89 (Ariz. 1976) ("We find that the fact that the seller left appellant's home immediately prior to the controlled sale as strong evidence to establish probable cause in this context"). See also State v. Urrutia, 539 P.2d 913 (Ariz.App. 1975); State v. Muffeo, 642 P.2d 404 (Wash.App. 1982); United States

v. Kunkler, 679 F.2d 187 (9th Cir. 1982). Part of this significance lies in the fact that in this case, unlike McManus, the dealer went to the defendant's house immediately after he had consummated one drug sale and before he made a second sale to the same party. Since the dealer had already "incriminated" himself, there is no reason to suspect that he went to the defendant's for any reason other than to secure more cocaine.

The two-pronged probable test standard of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), does not apply in this case because the facts establishing probable cause come from the observations of law enforcement officers and not from either a confidential informant or a person connected with the crime involved or known to associate with criminals. United States v. LaFond 482

F.Supp. 1379, 1384 (E.D.Wis. 1980). Since the officers were acting in their "normal capacity" as law enforcement officials, their veracity may be assumed and need not be independently demonstrated. LaFond; Kunkler, 679 F.2d at 190.

As previously discussed, the facts and circumstances related by Officer Bodine indicate there was probable cause to believe that cocaine was located in the defendant's automobile or even on his person. However, this possibility does not negate the probability, as found by the district court, that cocaine would be found at the defendant's residence. Any "alternative hypothesis . . . misconceives the nature of the probable cause inquiry." Chester, 537 F.2d at 176.

This Court finds that, based upon a common sense reading of the affidavit, the district court could have reasonably

concluded that the cocaine was probably located in the defendant's house. This finding of probable cause is supported by the affidavit. The judgment ot the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

APPENDIX "B" [dated: AUG 16 1983]

Timothy D. Moore v. State

3 Div. 713

Montgomery Circuit Court

ON REHEARING

BOWEN, PRESIDING JUDGE

Our finding of probable cause to search is strengthened by the application of the totality of the circumstances test of determining probable cause reaffirmed in Illinois v. Gates, (Ms. 81-430, June 8, 1983) ____ U.S. ____ (1983), and the abandonment of the two-pronged test established in Aquilar v. Texas, 378 U.S. 108 (*1964), and Spinelli v. United States, 393 U.S. 410 (1969).

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons

> supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a Reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud(ing) that probable cause existed."

Our review of the affidavit makes it apparent that the judge issuing the warrant had a substantial basis for concluding that probable cause existed to search the defendant's residence.

OPINION EXTENDED;
APPLICATION FOR REHEARING OVERRULED

All Judge Concur.

APPENDIX "C"

STATE Or ALABAMA * AFFIDAVIT IN SUPPORT
*
MONTGOMERY COUNTY * OF A DAYTIME SEARCH
*
CITY OF MONTGOMERY * WARRANT

Before me, the Honorable Craig Miller District Judge, Montgomery County, Alabama, personally appeared Sgt. Dennis Bodine, and after first being duly sworn deposes and says:

That he is a Police Officer with and for the Vice and Narcotics Unit, Montgomery Police Department, and that he has reason to believe and does believe, that cocaine and/or marijuana and/or hash and/or methaqualone is being kept, stored, concealed, used and sold at a mobile home trailer and outbuildings, and tractor trailer, and any vehicle located on the property described below occupied by Timothy D. Moore or Jane Moore located 20 miles south of Montgomery on Highway 331 going

until you get to Sellers, Alabama, then go 1 mile north of Sellers, turn left on a dirt road at the sign that says "Home of Bells Citgo A's", then go 100 yards to Old Sellers Road and turn right, then go 50 yards to the gate on the left with a mailbox with the name "MOORE", and then enter the property occupied by Timothy D. Moore or Jane Moore on which there is the house trailer. This is in violation of the Alabama Controlled Substances Act. And the facts tending to establish the foregoing for issuance of a daytime search warrant are as follows:

On two previous occasions, 7/9/82 and 7/15/82, a subject sold cocaine to an undercover Montgomery Police Officer. On 7/20/82 the undercover officer ordered an additional ounce of cocaine from the same subject. At approximately 10:02 A. M. this date, 7/20/82, this subject met with undercover officer and sold one-half (1/2)

ounce of cocaine. At the time of this sale, he was unable to provide the full ounce ordered and he requested that the undercover officer advance him the money needed to make the additional one-half (1/2) ounce purchase which was done. At approximately 10:06 A. M. this subject left the company of the undercover orficer and began his journey to the residence in Sellers, Alabama.

Utilizing helicopter surveillance as well as ground surveillance, this subject was observed going straight to the previously described residence of Timothy D. Moore without stopping. After the subject arrived at this residence, constant visual surveillance was maintained. After approximately 30 minutes, said subject departed from the residence of Timothy D. Moore and drove non-stop, straight back to the location where the undercover officer was waiting. Upon meeting with the

undercover orficer, said subject gave her an additional quantity of cocaine. At no time was visual contact lost on this subject.

The foregoing is based upon the personal knowledge of the affiant, and on facts obtained by the Vice and Narcotics Unit, Investigative Division, Montgomery Police Department, Montgomery, Alabama, and is made for the purpose or securing a search warrant for the premises of Timothy D. Moore or Jane Moore, located in Montgomery County, Alabama, in the daytime only.

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 21st DAY OF JULY, 1982.

s/ Dennis Bodine

SGT½ DENNIS BODINE
VICE AND NARCOTICS UNIT
MONTGOMERY POLICE DEPT.
MONTGOMERY, ALABAMA

s/ Craig Miller

DISTRICT JUDGE
15TH JUDICIAL DISTRICT
MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

APPENDIX "D"

STATE OF ALABAMA * IN THE CIRCUIT COURT OF
VS * MONTGOMERY COUNTY, ALA.
TIMOTHY MOORE * CRIMINAL CASE CV-82-1121
Defendant *

STIPULATION OF FACTS

COMES now the State of Alabama, by and through James H. Evans, District Attorney, and the Defendant, Timothy Dane Moore, by and through his Attorney of Record, Jimmy B. Pool, and shows unto this Honorable Court the following:

1. That the Defendant was indicted by the Montgomery County Grand Jury in July of 1982, with the offense of possession of cocaine, diazepam, marijuana.

2. That the Defendant waived arraignment but pled not quilty to the charges.

3. That the charges arose from the

execution of a search warrant at the home of Tim and Jayne Moore by agents of the State of Alabama, Montgomery County, and Montgomery City Police Department, on July 21, 1982.

4. That seized by the agents executing the search warrant was a quantity of marijuana, a quantity of diazepam, and a quantity of cocaine.

5. That a series of hearings have been held in regards to motions to suppress filed by Timothy Moore and Jayne Moore, said motions questioning the legality and/or constitutionality of the search.

6. That the Court has over-ruled the motion to suppress, and ruled that the evidence seized is admissable, with the exception ot $21,000.00 which was found by the agents in a suit case in a vehicle outside of the home.

7. That the cocaine, diazepam, and

marijuana seized, are all controlled substances, the possession of which are proscribed by the Alabama Uniform Controlled Substances Act.

8. That testimony has already been received by this Honorable Court during the various motions to suppress and hearings, wherein testimony was taken concerning the facts of the case.

9. That if a trial was held on the above styled case, all of the testimony elicited during the motions to suppress would be the same.

10. That the defendant pleads not guilty to the indictment, but consents to trial before this Court on this set of stipulated facts.

11. That the home of Tim and Jayne Moore is in Montgomery County, Alabama.

12. That the Court, in deciding this case, will consider all of the testimony

taken in the motions to suppress and that all of that testimony will, combined with all of the other pre-trial motions and briefs, be made part of the records of this set of stipulated facts.

DONE this 13th day of September, 1982.

s/ Timothy D. Moore

TIMOTHY DANE MOORE- Defendant

s/ [illegible] B. Pool

JIMMY B. POOL
Attorney for the Defendant

s/ Frank H. Hawthorne, Jr.

FRANK H. HAWTHORNE, JR.
Deputy District Attorney